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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JON ROBERT PERROTON, Defendant and Appellant.	H041294, H041486 (Santa Clara County Super. Ct. No. C1111047)

In 2012, defendant Jon Robert Perroton pleaded no contest to grand theft from an elder, forgery, and issuing a check without sufficient funds. (Pen. Code, §§ 368, subd. (d), 470, subd. (d), 476a.)[1] The trial court suspended imposition of sentence and granted a three-year term of probation. In 2013, defendant was convicted in San Mateo County of making criminal threats. (§ 422.) In 2014, the Santa Clara County Department of Probation petitioned to modify the terms of defendant's probation based on several alleged probation violations, including the criminal threats conviction. After a contested hearing in 2014, the trial court found five violations and revoked defendant's probation. The court sentenced defendant to four years in state prison.

[1] Subsequent undesignated statutory references are to the Penal Code.

Defendant appeals from the revocation of his probation on two grounds: (1) the trial court applied the wrong standard of proof in finding probation violations;[2] and (2) the evidence was insufficient to support three of the five probation violations. Defendant also appeals from the imposition of a state prison sentence on the ground that section 1170 mandated a county jail sentence.

We conclude the trial court applied the wrong standard of proof in finding defendant in violation of the terms of his probation. We further conclude the error was not harmless. Accordingly, we will reverse the order revoking probation and remand to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Underlying Offenses*[3]

At the time of the offenses, defendant was 62 years old. He was also unemployed. In March 2011, defendant's sister notified police that defendant was attempting to access the Charles Schwab account of his 84-year-old mother, Bette Perroton. Defendant had submitted a document to Charles Schwab purporting to grant him power of attorney over his mother's affairs. The document bore his mother's signature and appeared to be notarized, but his mother denied signing the document. When police confronted defendant with the document, he initially claimed his mother had signed it, but he later admitted he had forged her signature.

Defendant also told police he had attempted to buy a house in Atherton for $2.6 million dollars. He admitted he had sent the forged power of attorney document to a title company. During the investigation, police discovered defendant had written a check for $72,000 to Wells Fargo bank as a downpayment on the house, but the check was

[2] Defendant raised this part of his claim after we requested supplemental briefing on this issue.

[3] The factual narrative is based on the facts set forth in the probation report.

returned for insufficient funds. Investigators determined defendant never had enough money in his account to cover the $72,000 check.

Defendant told police he has attention deficit disorder and said he "lies a lot." He denied he was a pathological liar but said he talks to a counselor once a week.

B. *Procedural Background*

1. *Current Offenses*

The prosecution initially charged defendant by complaint in July 2011. After a preliminary hearing, the prosecution filed a first amended information charging defendant with six counts: Count One—Theft or embezzlement from an elder (§ 368, subd. (d)); Count Two—Using personal information without authorization (§ 530.5, subd. (a)); Counts Three, Four, and Five—Forgery of an instrument other than a check or money order (§ 470, subd. (d)); and Count Six—Issuing a check without sufficient funds (§ 476a.) The information further alleged defendant had served two prior prison terms (§667.5, subd. (b).)

In May 2012, defendant pleaded no contest to Counts One, Three, and Six. Defendant also admitted both prison priors. In June 2012, in accord with a negotiated disposition, the trial court suspended imposition of sentence, granted a three-year term of probation, and dismissed the remaining counts. Among other conditions of probation, the court ordered defendant "to submit his person, place of residence, vehicle, and any property under his control to search at any time, without a warrant, by any peace officer" and "to seek and maintain gainful employment and maintain academic and/or vocational training as directed by the probation officer."

2. *Defendant's Conviction for Making Criminal Threats*

On May 7, 2013, in San Mateo County, defendant pleaded no contest to making criminal threats, among other things. (§ 422.) He also admitted an allegation that he had used a deadly or dangerous weapon in the commission of the offense. (§ 12022, subd. (b).) According to police reports, defendant got into an argument with his

girlfriend in the parking lot of her apartment complex on November 27, 2012. When his girlfriend attempted to flee, defendant grabbed her by the wrist and held an unspecified metal object to her head. He told her to go to her apartment and threatened to kill her if she did not comply. He then attempted to force her to enter the apartment, but she escaped his grasp, whereupon he left. Witnesses from nearby apartments saw and heard the struggle. The police arrested defendant for this offense in December 2012. Defendant pleaded no contest to the charges on May 7, 2013. On June 4, 2013, the San Mateo County Superior Court suspended imposition of sentence and granted a three-year term of probation, including one year in county jail as a condition of probation.

3. *Alleged Probation Violations*

In July 2013, the Santa Clara County Department of Probation petitioned to modify the terms of defendant's probation in the current case. The petition alleged, among other things, that defendant had violated the terms of his probation by committing the criminal threats offense in San Mateo County. The probation officer mailed a *Vickers*[4] letter to defendant notifying him of the hearing, but the letter was returned as "not deliverable as addressed."

In March 2014, the probation department petitioned again for a modification of the terms of probation based on seven alleged violations. Two alleged violations were dismissed prior to the hearing on the matter. By the time of the hearing, the petition alleged, among other things, that defendant: (1) committed and was convicted of making criminal threats in San Mateo County; (2) failed to report for a scheduled probation appointment on December 14, 2012; (3) failed to provide proof of education, vocational training, or employment; (4) failed to make himself available to search; and (5) failed to provide probation with a valid address, causing the previously-mailed *Vickers* letter to be returned.

[4] *People v. Vickers* (1972) 8 Cal.3d 451 (*Vickers*).

On September 17, 2014, the trial court held a formal hearing on the alleged probation violations. Defendant admitted the criminal threats conviction. As to the alleged failure to report for the probation appointment on December 14, 2012, defendant testified he had never been told to report for the appointment and he had never received notice of it. As to the alleged failure to provide proof of education, training, or employment, defendant testified he was never asked to provide that information. Defendant also testified he had been in custody since September 2013, and he provided documents showing he had participated in education and rehabilitation programs while in custody. As to the alleged failure to make himself available to search, defendant testified he lived in Los Angeles and that his probation had been transferred to Los Angeles County. Finally, as to the failure to provide probation with a valid address, defendant testified he had lost his housing during his time in custody, and he had assumed his probation had been transferred to Los Angeles County.

The prosecution offered several documents into evidence to prove the alleged violations. As to the first alleged violation, a certified copy of a "REGISTER OF ACTIONS" from the San Mateo County Superior Court showed defendant had pleaded no contest to making criminal threats and admitted the allegation that he had used a deadly or dangerous weapon in the commission of the offense. The prosecution also offered the police reports describing the facts of the offense.

To support the allegation that defendant failed to report to his probation officer on December 14, 2012, the prosecution submitted the probation officer's "Case Notes/History" log. An entry dated October 15, 2012, shows defendant met with his probation officer that day, that he had just been released from federal custody, and that he was living in Los Angeles. On cross-examination, defendant admitted he had met with his probation officer on October 15, 2012, and that the officer had informed him of the terms and conditions of his probation. A form titled "Standard Terms and Conditions," signed by defendant on October 15, included the instruction: "<u>You must report to this</u>

department as directed by your Probation Officer." A subsequent entry in the probation officer's log, dated October 24, 2012, stated: "File received. CL for 12/14/12." Another subsequent entry dated December 14, 2012, stated: "Defendant contact—Failed to Report." The prosecution argued these two entries showed that, on October 24, 2012, the probation officer had sent a "contact letter" to defendant instructing him to report on December 14, 2012, and that he failed to do so. The contact letter is not in the record. When the court questioned defendant about his failure to report to his probation officer, defendant claimed he was in custody at the time.

As to the allegation that defendant failed to provide proof of education, vocational training, or employment, the prosecution presented the "Standard Terms and Conditions" form signed by defendant. The form instructed defendant: "Remain employed or engaged in a useful activity. If unemployed, you must diligently seek employment. You must report immediately to this department any change of employment."

As to the allegation that defendant failed to make himself available to search, a police report attached to the petition for modification described police officers' interactions with defendant when they arrested him for the domestic violence incident in December 2012. According to the report, when the police arrested defendant, he told them they did not have permission to search his vehicle. When they attempted to retrieve an object from his pocket, "he immediately flexed his left arms' muscles, stiffened his body, attempted to grab [the officer's] hand and tried to block the opening to his rear pocket while he screamed something to the extent that [the officer] was not allowed to reach into his pocket." The officers forcibly raised defendant's wrist and elbow to access his rear pocket.

As to the allegation that defendant failed to provide his probation officer with a valid address, the prosecution submitted a copy of the *Vickers* letter the probation officer had mailed to defendant on July 17, 2013. The letter was addressed to defendant at "2820 Sawtelle Blvd., Los Angeles, CA *91112*." (Italics added.) The post office

stamped the letter "RETURN TO SENDER, NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD." The trial court noted that the probation officer's "Case Notes/History" log contained an entry dated May 10, 2013, stating that defendant had provided an address in Los Angeles, but according to "Yahoo Map[s]" the address was not valid. When the court questioned defendant about the matter, he testified that he had provided probation with the address of 2820 Sawtelle Boulevard. The court noted this was not a valid address according to the probation officer's notes as based on "Yahoo Maps." Defendant responded, "Well, I was getting mail there and it is a valid address, as far as I know." The trial court then noted another entry in the log, dated July 9, 2013, indicating that defendant had provided his probation officer from San Mateo with an address of "2820 Sawtell[e] Boulevard, LA, *90064*." (Italics added.) Another log entry on the same date stated that the probation officer spoke with defendant by phone and that "he confirmed his address at Sawtelle Blvd and stated he lives in a house."

The trial court found defendant in violation of his probation with respect to all five allegations. The court further stated "that the People have met their burden, which is—the burden is probable cause." The court revoked defendant's probation and imposed a term of four years in state prison, composed of the three-year midterm for Count One with a consecutive one-year term for one of the prior prison terms. The court struck the remaining prison prior. Defendant lodged no objections.

II. DISCUSSION

A. *Revocation of Probation*

Defendant contends the trial court erroneously revoked his probation because the evidence is insufficient to support three of the violations, and the court applied the wrong standard of proof. The Attorney General concedes the trial court applied the wrong standard of proof, but argues the evidence was sufficient to prove the violations and that any error was harmless.

1. *Legal Principles*

In a formal probation revocation hearing, the prosecution bears the burden of proving a probation violation by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441 (*Rodriguez*).) The decision to revoke probation lies within the discretion of the trial court. (*Id.* at p. 443.) On appeal, we will reverse the decision to revoke probation only if the court exercised its discretion in an arbitrary or capricious manner. (*People v. Delson* (1984) 161 Cal.App.3d 56, 62.) "[W]here the trial court was required to resolve conflicting evidence, review on appeal is based on the substantial evidence test. Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted.) However, "[d]iscretion is delimited by the applicable legal standards, a departure from which constitutes an 'abuse' of discretion. [Citation.]" (*People v. Harris* (1998) 60 Cal.App.4th 727, 736.) Thus, a court abuses its discretion when it applies the wrong legal standard. (*People v. Carter* (2014) 227 Cal.App.4th 322, 328.)

2. *Application of the Probable Cause Standard Was an Abuse of Discretion*

The parties agree the trial court erred by applying the probable cause standard of proof in finding defendant's probation violations. However, the Attorney General contends the error was harmless, even if prejudice is assessed under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), which applies to federal constitutional errors [prosecution bears the burden of proving the error harmless beyond a reasonable doubt].)

As an initial matter, we must determine whether to apply the *Chapman* standard for federal constitutional error or the standard under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) for state law error [defendant must show a reasonable probability of a

better outcome had the error not occurred]. The matter is not settled. The federal Constitution does not set forth the required standard of proof for a violation of supervised release, and the United States Supreme Court has not set forth any standard as a matter of federal due process. Case law makes clear that proof beyond a reasonable doubt is not necessary to find a probation violation. And federal statutory law requires proof by a preponderance of the evidence in federal district courts. (*Johnson v. United States* (2000) 529 U.S. 694, 700; *United States v. Aquino* (9th Cir. 2015) 794 F.3d 1033, 1036; 18 U.S.C. § 3583.) As to state law, our high court in *Rodriguez* surveyed the various standards used in different jurisdictions at the time of that opinion. (*Rodriguez*, *supra*, 51 Cal.3d at pp. 446-447.) The court found that a plurality of states used the preponderance-of-the-evidence standard. (*Id.* at p. 446, fn. 4.) A smaller number of states used a somewhat lower standard variously characterized as a "reasonably satisfied" or "reasonable certainty" standard. (*Id.* at p. 446, fn. 5.) Our own research has not uncovered any jurisdiction that applies a probable cause standard, with the possible exception of Virginia's "reasonable cause" standard. (See *Hamilton v. Commonwealth* (1976) 217 Va. 325, 327.) We thus conclude federal due process requires something more than "probable cause" to find that a defendant has violated the terms of his or her probation. Accordingly, we will apply the "beyond a reasonable doubt" standard of harmless error under *Chapman*. We note, however, that our conclusion would be the same had we applied the "reasonable probability of a better outcome" standard under *Watson*.

The Attorney General contends the error was harmless beyond a reasonable doubt because defendant admitted at least two of the probation violations, including his criminal threats conviction. Defendant argues it cannot be determined with certainty whether the court would have revoked his probation because the court could have exercised its discretion to reinstate probation if it had found defendant had not committed all five alleged probation violations. For this proposition, defendant relies on *People v.*

Self (1991) 233 Cal.App.3d 414 (*Self*). There, the trial court found multiple grounds for revocation of probation, but the court of appeal found the trial court had erred with respect to two of those grounds. Although the defendant had conceded that grounds existed for at least one probation violation, the court of appeal declined to conclude the errors were harmless. The court held: "Although the court might, in the exercise of its broad discretion, revoke probation and impose a prison sentence based on that ground alone, on this record we cannot conclude the court would have sentenced defendant to state prison for the middle term based solely on her failure to report."

We agree with the reasoning in *Self* and will apply it here. First, as defendant acknowledges, there is no dispute he violated the terms of his probation by committing the criminal threats offense. But we cannot say beyond a reasonable doubt that the trial court would have revoked his probation on this ground alone. Even under the *Watson* standard, there is a reasonable probability the trial court would have imposed a more lenient sentence had the court found fewer violations.

Second, we conclude the evidence supporting three of the other alleged violations was insufficient under the preponderance-of-the-evidence standard. First, as to the allegation that defendant failed to report for a scheduled probation appointment on December 14, 2012, the prosecution was required to show that defendant's failure to report was willful. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 375-379.) Defendant testified he never received notice of his appointment to report. The only evidence the prosecution offered to prove notice was a log entry in the probation officer's case notes stating: "File received. CL for 12/14/12." The prosecution argued this showed a "contact letter" was mailed to defendant notifying him of the appointment, but the probation officer did not testify as to the meaning of the log entry, and the asserted contact letter was never offered into evidence.

Second, defendant contends his failure to report for his probation appointment was due to his probation officer mailing the notice to the wrong address. He contends his

failure to report was therefore not willful. Indeed, there is no evidence of the address to which the notice was sent. The probation officer in July 2013 sent a *Vickers* letter which was returned for lack of a deliverable address. There is no evidence in the record showing the address to which the December 2012 notice was sent.

The Attorney General argues that the returned *Vickers* letter is proof of defendant's failure to provide a valid address to his probation officer, but the record does not support this claim. In examining the probation officer's log of case notes, the trial court did not note the reason for the returned letter: The street address on the envelope was valid, but the zip code was erroneous. The letter was mailed to "2820 Sawtelle Blvd., Los Angeles, CA 91112," but as the probation officer's case notes confirm, defendant had provided the address of "2820 Sawtelle Boulevard, LA, 90064." The trial court also relied on a log entry stating that one of defendant's probation officers had used Yahoo! Maps to check defendant's address, but that entry was made in May 2013—when defendant was in custody—and the entry does not state what address had been entered into Yahoo! Maps. A subsequent log entry on July 9, after defendant had been released, shows the probation officer had by then obtained the valid address of "2820 Sawtelle Boulevard, LA, 90064" from defendant's probation officer in San Mateo County. The next log entry states that the officer then called defendant and confirmed his address. There is no explanation in the record for why the *Vickers* letter was sent to the wrong zip code. More importantly, there is no evidence in the record that defendant provided his probation officer with the wrong zip code.

And third, as to the alleged failure to provide proof of employment or schooling, the prosecution never provided evidence that the probation officer had requested any such proof. The court had ordered defendant "to seek and maintain gainful employment and maintain academic and/or vocational training as directed by the probation officer." The standard terms of probation provided to defendant by his probation officer required him to seek employment and "report immediately to this department any *change* of

employment." (Italics added.) The prosecution presented no evidence that defendant changed employment. Indeed, the record shows defendant was in custody for much of the probation period, which would have hindered his ability to seek employment. And defendant provided proof that he had engaged in educational or rehabilitative training while in custody.

As to the allegation that defendant failed to make himself available for search, we find the evidence was sufficient to support this finding. The police reports in evidence show that defendant resisted officers' attempts to search him during his arrest for the domestic violence incident in December 2012. Defendant argues that the police reports are hearsay and that "the prosecution implicitly did not introduce the documents for the truth of the matters asserted." But defendant lodged no objections when the prosecution offered the documents into evidence, and the court placed no restrictions on their use. We conclude the court properly considered the police reports for the truth of the statements in them, and we further conclude the reports were sufficient to establish that defendant resisted an attempt to search him.

In summary, we find the evidence was sufficient to establish two of the alleged violations—that defendant committed the criminal threats offense, and that he failed to submit to a search. But the evidence supporting the three remaining violations was insufficient. Furthermore, we cannot say with the requisite degree of certainty that the error was harmless—i.e., that the trial court would have imposed the same sentence had the court applied the proper standard of proof. Accordingly, we will reverse the judgment and remand for a new hearing.

B. *Imposition of a State Prison Sentence*

Defendant also contends the trial court imposed an unauthorized state prison sentence under section 1170 because the conviction on which the sentence was based was not a "prior or current felony conviction" under subdivision (h)(3) of that statute. The Attorney General argues the intent of the statute supports the imposition of a prison

sentence. Although we will vacate the sentence for the reasons set forth in Section II.A. above, we will address defendant's claim to provide guidance to the trial court on remand.

1. *Legal Principles*

Subdivision (h) of section 1170 provides, in relevant part: "(1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years. [¶] (2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense." (§ 1170, subds. (h)(1) & (h)(2).) The mandatory imposition of a county jail sentence under these subdivisions is subject to an exception set forth in subdivision (h)(3), which provides in relevant part: "Notwithstanding paragraphs (1) and (2), where the defendant [] has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 . . . an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison." (§ 1170, subd. (h)(3).)

2. *A State Prison Sentence Was Unauthorized Under Section 1170(h)*

Defendant committed felony violations of section 368, subdivision (d), section 470, subdivision (d), and section 476a. None of these offenses constitutes a serious or violent felony under section 1170. Defendant committed these offenses "[o]n or about and between January 31, 2011 and March 21, 2011." In November 2012, after defendant had been convicted and sentenced for these offenses, he committed the offense of making criminal threats in violation of section 422, which constitutes a "serious felony" under section 1192.7, subdivision (c)(38). Defendant was convicted of that offense, among others, on May 7, 2013. At the conclusion of the revocation hearing on September 17, 2014, the trial court imposed a state prison sentence based on defendant's violation of section 422.

Although a violation of section 422 constitutes a serious felony, it did not constitute a "prior or current felony conviction" under section 1170, subdivision (h)(3). A "current felony conviction" refers to the offense for which the defendant is being sentenced. (See *People v. Lawrence* (2000) 24 Cal.4th 219, 223 [construing "current" felony conviction as used in section 667].) Here, those current offense included felony violations of section 368, subdivision (d), section 470, subdivision (d), and section 476a. None of these offenses was a serious or violent felony. Therefore, the trial court could only have imposed a state prison sentence based on a "prior" serious felony conviction. Reading the plain language of the statute, a "prior" conviction means a conviction that occurred prior to the current felony conviction. (See, e.g., *People v. Snook* (1997) 16 Cal.4th 1210, 1218 [construing the word "prior" as used in former Vehicle Code section 23175]; *People v. Albitre* (1986) 184 Cal.App.3d 895, 897 [the word "prior" defines the timing of the offenses which trigger enhanced punishment].) The Attorney General does not dispute this plain language interpretation. Instead, she argues that such a construction is inconsistent with the purpose and intent of the statute. But in determining the intent of a statute, we look first to the plain meaning of its language. If the language is unambiguous, we look no further. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Here, the criminal threats conviction occurred *after* defendant was convicted of the current offenses. Hence, the court could not have based a state prison term under section 1170 on the subsequent criminal threats conviction.

III. DISPOSITION

The order revoking probation is reversed and the state prison sentence is vacated. The matter is remanded for further proceedings.

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Márquez, J.

WE CONCUR:

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Rushing, P. J.

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Grover, J.